SUPREME COURT, U.S.

AUG 30 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 416

C. BOYD CORSA, FISH PRODUCTS COMPANY OF NEW JERSEY, A NEW JERSEY CORPORATION, ATLANTIC NAVIGATION COMPANY, A NEW JERSEY CORPORATION, SEACOAST PRODUCTS, INC., A DELAWARE CORPORATION, AND FISH PRODUCTS COMPANY, A DELAWARE CORPORATION, *Plaintiffs-Appellants*,

vs.

JOHN P. TAWES, FRED P. GLOSE AND JOHN R. JEWELL, CONSTITUTING THE COMMISSION OF TIDEWATER FISHERIES OF MARYLAND, AND DANIEL T. PRETTYMAN, STATE'S ATTORNEY FOR WORCESTER COUNTY, MARYLAND, *Defendants-Appellees*,

EDWIN ALLISON, JOHN LOWRY, DAVID H. HART, INC., A NEW JERSEY CORPORATION, ATLANTIC FISHING CO., INCORPORATED, A VIRGINIA CORPORATION, PENINSULA FISHERIES, INCORPORATED, A NEW JERSEY CORPORATION, HAYLOW FISHERIES, INCORPORATED, A VIRGINIA CORPORATION, RAYMOND L. HAYNIE, INCORPORATED, A VIRGINIA CORPORATION, NEW JERSEY MENHADEN PRODUCTS, INC., A NEW JERSEY CORPORATION, STANDARD PRODUCTS CO., INCORPORATED, A VIRGINIA CORPORATION, REEDVILLE OIL AND GUANO CO., INCORPORATED, A VIRGINIA CORPORATION, MOTOR VESSEL H. R. HUMPHREYS, INCORPORATED, A VIRGINIA CORPORATION, *Intervening Plaintiffs-Appellants*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

STATEMENT AS TO JURISDICTION

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INDEX

Table of Contents

	PAGE
Opinion Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	3
Statement of Facts and History of Case	4
The Questions Are Substantial	6
Conclusion	14
Appendix A — Text of Opinion Below	15
B — Text of Statutes Involved	26

Table of Citations

Cases

Anderson v. Mullaney, 191 F. 2d 123 (9th Cir. 1951), affirmed, Mullaney v. Anderson, 342 U.S. 415	10
Cities Service Gas Company v. Peerless Oil & Gas Company, 340 U.S. 179	12
Foster Fountain Packing Company v. Haydel, 272 U.S. 1	8
Freeman v. Hewitt, 329 U.S. 249	11
H. P. Hood & Sons v. DuMond, 336 U.S. 525	12
Interstate Busses Corporation v. Blodgett, 276 U.S. 245	2
Lawton v. Steele, 152 U.S. 133	9, 10
Liggett v. Baldridge, 278 U.S. 105	9
Manchester v. Massachusetts, 139 U.S. 240	11, 12
Minnesota v. Barber, 136 U.S. 313	13

PAGE

New State Oil Co. v. Liebman, 285 U.S. 262 9

Palmetto Fire Insurance Company v. Conn., 272 U.S. 295 2

Toomer v. Witzell, 334 U.S. 385 ..... 2, 13

Statutes

Annotated Code of Maryland (1951):

Article 66c, Section 259(a) 3, 5, 26

Article 66c, Section 258 ..... 3, 5, 8, 13, 26

Act of June 25, 1948, c. 646, 62 Stat. 964, as amended May 24, 1949, c. 139 §111, 63 Stat. 105, and Aug. 28, 1954, c. 1033, 68 Stat. 890 (28 U.S.C. Secs. 2201, 2202); 62 Stat. 926, 961, 968 (28 U.S.C. Secs. 1253, 2101(b), 2281, 2284) 2

Submerged Lands Act of 1953, 67 Stat. 29, 32 (43 U.S.C. Secs. 1301(e), 1311(a)) 9

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VS.

JOHN P. TAWES, FRED P. GLOSE AND JOHN R. JEWELL, CONSTITUTING THE COMMISSION OF TIDEWATER FISHERIES OF MARYLAND; AND DANIEL T. PRETTYMAN, STATE'S ATTORNEY FOR WORCESTER COUNTY, MARYLAND, *Defendants-Appellees,*

EDWIN ALLISON, JOHN LOWRY, DAVID H. HART, INC., A NEW JERSEY CORPORATION, ATLANTIC FISHING CO., INCORPORATED, A VIRGINIA CORPORATION, PENINSULA FISHERIES, INCORPORATED, A NEW JERSEY CORPORATION, HAYLOW FISHERIES, INCORPORATED, A VIRGINIA CORPORATION, RAYMOND L. HAYNIE, INCORPORATED, A VIRGINIA CORPORATION, NEW JERSEY MENHADEN PRODUCTS, INC., A NEW JERSEY CORPORATION, STANDARD PRODUCTS CO., INCORPORATED, A VIRGINIA CORPORATION, REEDVILLE OIL AND GUANO CO., INCORPORATED, A VIRGINIA CORPORATION, MOTOR VESSEL H. R. HUMPHREYS, INCORPORATED, A VIRGINIA CORPORATION, *Intervening Plaintiffs-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

STATEMENT AS TO JURISDICTION

In compliance with Rule 13(2) and Rule 15 of the Revised Rules of the Supreme Court of the United States, as amended, Plaintiffs-Appellants and Intervening Plaintiffs-

Appellants, hereinafter jointly referred to as Appellants, submit herewith their statement particularly disclosing the basis upon which this Honorable Court has jurisdiction on appeal to review the judgment of the specially constituted three-judge district court entered in this cause.

Opinion Below

The opinion of the District Court for the District of Maryland, sitting as a specially constituted three-judge court, is reported in 149 F. Supp. 771. A copy of the opinion is included herewith as Appendix A.

Jurisdiction

This case involves a proceeding brought pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 964, as amended May 24, 1949, c. 139 §111, 63 Stat. 105, and Aug. 28, 1954, c. 1033, 68 Stat. 890 (28 U. S. C. Secs. 2201, 2202), and 62 Stat. 968 (28 U. S. C. Secs. 2281, 2284), for a declaratory judgment as to the constitutionality of certain statutes of the State of Maryland, and for injunctive relief against the enforcement of those statutes.

The decree of the three-judge district court is dated May 10, 1957, and was entered on that date. A Notice Of Appeal was filed by Appellants in the United States District Court for the District of Maryland on July 5, 1957.

The jurisdiction of this Honorable Court to review this decision on direct appeal is conferred by the Act of June 25, 1948, c. 646, 62 Stat. 926, 961, 968 (28 U. S. C. Secs. 1253, 2101(b), 2281, 2284). The following cases sustain the jurisdiction of this Honorable Court to review the decision on direct appeal in this cause: *Toomer v. Witsell*, 334 U. S. 385, *Interstate Busses Corporation v. Blodgett*, 276 U. S. 245, *Palmetto Fire Insurance Company v. Conn*, 272 U. S. 295.

Statutes Involved

The Maryland statutes, the constitutionality of which is herein involved, are Section 258 and Section 259(a) of Article 66C of the Annotated Code of Maryland (1951), reported in Volume 2, Annotated Code of Maryland (1951) at page 3262. The text of the aforesaid statutes is set forth in Appendix B hereto.

Questions Presented

The following questions and all questions fairly comprised therein are presented by this appeal:

1) Whether Article 66C, Section 259(a) of the Annotated Code of Maryland (1951), which prohibits the use of purse nets for catching fish in Maryland jurisdictional waters, and the effect of which is to prohibit Appellants from carrying on their business of catching an inedible, migratory species of fish, known as menhaden, for commercial purposes, in the waters of the Atlantic Ocean off the coast of Maryland, violates Section I, Article XIV of the Amendments to the Constitution of the United States by depriving the Appellants of liberty and property without due process of law.

2) Whether an undue burden is imposed on commerce, in violation of Article I, Section 8 of the Constitution of the United States, by the aforesaid Maryland statute, the necessary effect of which is to impede and restrain commerce among the states in the products of the menhaden industry.

3) Whether Article 66C, Section 258, of the Annotated Code of Maryland (1951), which prohibits the use of nets of any description for the catching of fish within Maryland jurisdictional waters by others than residents or landowners of Maryland, violates Article IV, Section 2, of the

Constitution of the United States, and Article XIV of the Amendments to the Constitution of the United States, by depriving the individual Appellants of the privileges and immunities of citizens of the United States and by depriving them of the equal protection of the laws, and by depriving the corporate Appellants of the equal protection of the laws.

Statement of Facts and History of Case

Appellants, all non-residents of the State of Maryland, are engaged as boat owners, operators, lessees, or processors, in commerce among the states in menhaden, an inedible migratory fin fish, and the various products derived therefrom. This commerce is an integrated operation consisting of the catching, transporting, delivery, and processing of the said fish, and the preparation, distribution and sale of the various industrial and agricultural products derived therefrom.

The menhaden industry is a large and important one, the total value of its manufactured products in 1955 having exceeded $41,000,000.00. The continuance of this industry and of commerce in its products depends upon the ability of the Appellants and others similarly situated to catch menhaden in quantities sufficient for commercial purposes. The only feasible method of doing this is by use of the type of fishing device known as the purse net.

Menhaden school in their greatest abundance in the ocean waters off the eastern coast of the United States, including the waters off the coast of Maryland, within the three-mile maritime belt. The said Maryland waters are an important segment of the fishing grounds relied upon by the Appellants in following the migration of menhaden in order to procure them in sufficient quantities to supply the industry.

The Defendants-Appellees are officers of the State of Maryland charged with the enforcement of the State's fishing laws. Those laws, namely Sections 258 and 259(a) of Article 66C of the Annotated Code of Maryland (1951), prohibit the use of nets of any description for the catching of fish in Maryland waters by others than residents of Maryland or owners of land in Maryland, and prohibit the use of purse nets by anyone for catching fish in Maryland waters. The necessary and inevitable result of these statutes is to exclude the menhaden industry from Maryland, and to create an artificial zone in which the Appellants are forbidden to carry on an indispensable element of commerce in menhaden. No other state, within the knowledge of the Appellants, completely bars the use of purse nets in catching menhaden.

On June 26, 1956, one of the Appellants, C. Boyd Corsa, a non-resident captain of a menhaden fishing boat, owned by, and under lease by New Jersey and Delaware corporations, was arrested by Maryland authorities for fishing for menhaden with a purse net in the ocean waters off the coast of Maryland. Thereupon, on August 13, 1956, a number of the Appellants brought this suit for a declaratory judgment with respect to the constitutionality of the Maryland statutes, and for injunctive relief.

On August 13, 1956, the United States District Court for the District of Maryland granted a temporary restraining order, restraining the enforcement of Sections 258 and 259 of Article 66C of the Annotated Code of Maryland against the original Plaintiffs, or any of them, or against any captain, officer or member of the crew of any boat owned by any such Plaintiff. Subsequently, by stipulation of the parties and order of court, the temporary restraining order was extended until final disposition of the case.

On September 21, 1956, the other Appellants were granted leave to intervene in these proceedings and seek the same relief. The criminal prosecution of Appellant, C. Boyd Corsa, was voluntarily continued by the Circuit Court of Worcester County, Maryland, pending the final disposition of this action.

Defendants-Appellees filed a motion to dismiss the complaint and intervening complaint, which motion came on for hearing before the three-judge court convened pursuant to 62 Stat. 968, (28 U.S.C. Secs. 2281, 2284). After full argument, the court signed an order overruling the motion to dismiss, and granting an interlocutory injunction embodying the terms of the prior restraining order, and including the Intervening Plaintiffs.

The trial of the case took place on February 25 and 26, 1957, the court's opinion was filed on March 27, 1957, and the decree dismissing the complaint and intervening complaint was signed on May 10, 1957, and entered the same day.

The Questions Are Substantial

The menhaden industry constitutes one of the largest and most important fishing industries in the United States. Its products are necessary and useful in a variety of dependent industries, perhaps the most important of which is the raising of poultry, which relies upon the menhaden industry for its supply of an almost indispensable and otherwise unobtainable protein factor.

The industry comprises an integrated operation which culminates in the reduction of menhaden to its various by-products. In order to catch these inedible fish, the fishing boats follow their migrations along the ocean coast, and whenever and wherever a school is sighted the fishermen

set about to catch them by the use of purse nets, the only device by which menhaden can be caught in quantities sufficient for commercial purposes.

The practical effect of the statutes in question is to exclude all fishing of menhaden in the valuable fishing grounds off the coast of Maryland within the three-mile limit. This requires the Appellants to cease their operations when fish are sighted within the prohibited area, and such operations cannot be resumed until and unless menhaden are sighted elsewhere. The disastrous effect upon the Appellants' business is clear when it is considered that a single catch of menhaden is worth from $7,000.00 to $10,000.00, and that the expense of operating a menhaden fishing boat is more than $1,000.00 a day.

Defendants-Appellees seek to justify the Maryland statutes on the basis that they were enacted as conservation measures and are, therefore, within the scope of the police powers of Maryland.

There is no serious doubt that the Maryland regulations were enacted in response to the unjustified promptings of sport fishermen, who constitute a special interest group within the State. The mistaken belief of this group that a prohibition against menhaden fishing is necessary for the protection of their sport cannot make such prohibition a reasonable conservation measure when, in the opinion of scientists who have devoted their lives to the study of the conservation of fisheries, there is no reasonable relationship between such prohibition and valid conservation objectives. This is especially so in view of credible testimony that purse net fishing does not interfere with sport fishing. "Conservation" is not a term which can be applied haphazardly by a state to any regulation which it seeks to impose, and courts are not bound by legislative declara-

tions of purposes or objectives. *Foster-Fountain Packing Company v. Haydel*, 272 U. S. 1.

During the last decade, largely under auspices of the Fish and Wildlife Service of the United States Department of the Interior, a large and valuable body of scientific knowledge has been developed concerning the habits and biological nature of the menhaden, and the effects of various factors upon its abundance and the abundance of other fishes found in its environment. This knowledge is available and was brought to the attention of the court below.

Some of the foremost scientists in the domain of conservation, not only from the Fish and Wildlife Service, but also from neighboring states and universities, testified in the trial of this case. They stated that it is inconceivable that the prohibitions imposed by the Maryland statutes could be considered to have any reasonable relationship to conservation or any utility or efficacy as conservation measures. Even the biologist employed by the Commission of Tidewater Fisheries of the State of Maryland, who was called as a witness by the Defendants-Appellees, testified that, as applied to menhaden fishing, the Maryland prohibition against the use of purse nets has not been demonstrated to have any justification from a conservation standpoint.

The remedy of these non-resident Appellants should not be confined to an effort to change the Maryland fishing statutes, one of which openly discriminates against non-residents (Section 258 of Article 66C of the Annotated Code of Maryland). There was, neither at the time of the passage of the regulations in question, nor is there now, any activity of any consequence by Maryland residents in the menhaden industry.

If such statutory prohibitions deprive the Appellants of their right to engage in a lawful occupation, and if they unduly interfere with interstate commerce, and deprive the Appellants of the equal protection of the laws and the privileges and immunities of citizens of the several states and of the United States, should the Appellants be required to rely upon the legislature for relief?

These questions are substantial and are of great importance not only to the whole menhaden industry and the purchasers of its products, but also to the development of conservation within and among the states.

1. Under the Due Process Clause of the Constitution of the United States, the right to engage in a lawful occupation may not be interfered with by a state, under the guise of protecting the public interest, by legislative action which is arbitrary or without a real and substantial relation to some purpose within the power of the state to effect, such as the health, safety or morals of its people. *Liggett v. Baldridge*, 278 U. S. 105; *New State Ice Co. v. Liebman*, 285 U. S. 262.

As a general proposition the regulation of coastal fisheries is within the police power of the individual states. *Toomer v. Witsell*, 334 U. S. 385, 393; *Submerged Lands Act of 1953*, 67 Stat. 32, 39, (43 U.S.C. Secs. 1301(e), 1311(a)). This regulatory power, however, is subject to recognized constitutional limitations. To justify a state in imposing its authority in behalf of the public, in the regulation of its fisheries as well as in other aspects of the police power, it must appear — first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and secondly, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. *Lawton*

v. Steele, 152 U. S. 133. In the case last cited the Court upheld the right of New York to prohibit fishing in its inland waters by means other than hook and line. However, the Court stated at page 137:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In view of the undisputed testimony of the scientists who testified in this case that the regulations bear no reasonable relation to a valid conservation objective, it is submitted that the court below should have declared the statutes unconstitutional as an improper exercise of the police power of the State of Maryland, and as a violation of the Due Process Clause of the Constitution of the United States.

2. It cannot be doubted that the Maryland statutes here in question affect interstate commerce. In *Anderson v. Mullaney*, 191 F. 2d 123 (9th Cir. 1951), affirmed, *Mullaney v. Anderson*, 342 U. S. 415, the Court of Appeals held that the great annual movement of fishermen to the Alaskan fishing grounds was the beginning of a chain of interstate commerce, which ended with the delivery of the processed product to dealers in the various states. A territorial tax imposed by Alaska, which tax was many times higher for non-residents than for residents, was held to be an unconstitutional burden on interstate commerce. The court stated at page 129:

> "When we consider that the movement of the fishermen themselves constitutes interstate commerce, it is apparent that the problem presented by appellant's

contention cannot be disposed of by saying that 'the taxable event — the taking of the fish — occurs before the fish have entered the flow of commerce'. It is true that the taking of the fish is a local incident, but if the tax in its practical operation has a discriminatory impact upon some aspect of interstate commerce, the local tax cannot be sustained by simply tying it to a local incident."

Similarly, in the instant case, a chain of interstate commerce begins when the fishermen set out from their ports in the various coastal states, and ends with the delivery of the processed products to the dealers in the several states. Thus, the prohibition here cannot be sustained merely on the grounds that it deals with a "local incident".

In *Manchester v. Massachusetts,* 139 U. S. 240, cited by the court below, it was held that a restriction similar to that in the Maryland statute was not an unreasonable regulation and was valid in the absence of any action by Congress to assume control of the menhaden fisheries in Buzzard's Bay, Masachusetts. However, the opinion does not indicate that the fisherman there involved was engaged in Interstate Commerce or that the menhaden were even being transported to another state. In fact, the Court based its opinion upon the premise that the Commerce Clause does not limit the power of a state to regulate fishing unless such a regulation is in conflict with affirmative legislation enacted by Congress pursuant to the Commerce Clause. Since this early case this Court has made it clear that the Commerce Clause is not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the states, but by its own force, creates an area of trade free from interference by the states. *Freeman v. Hewitt,* 329 U. S. 249.

It should also be observed in passing, that in 1891 when the *Manchester* case was decided there was little scientific knowledge concerning the effect of taking menhaden with purse nets on the supply of menhaden.

It has been held that a state regulation affecting interstate commerce, in order to be upheld, must not discriminate against or place an embargo on that commerce, that it must safeguard an obvious state interest, and that the local interest at stake must outweigh whatever national interest there might be in the prevention of state restrictions. *Cities Service Gas Company v. Peerless Oil & Gas Company*, 340 U. S. 179, 186.

It is submitted that the Maryland statutes, in effect, exclude the menhaden industry from Maryland waters and set up a prohibited area obstructing and burdening the economic pattern of the industry along the entire Atlantic coast. Further, that since there is no justification for the regulations as conservation measures there is no valid state interest in the prohibitory statutes, insofar as the menhaden industry is concerned. Certainly the unjustifiable complaints of sport fishermen in and around Ocean City, Maryland, and the economic interests dependent upon sport fishing at that resort, are not interests of such importance that they outweigh the national interest in the preservation of the menhaden industry.

It is a fundamental principle that a state may not promote its own economic advantages by the curtailment or burdening of interstate commerce. As stated by Mr. Justice Jackson in *H. P. Hood & Sons, Inc., v. DuMond*, 336 U. S. 525, 533:

> "The distinction between the power of the state to shelter its people from menaces to their health or safety and from fraud, even when those dangers ema-

nate from Interstate Commerce, and its lack of power to retard, burden or restrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law."

The enactment, by the other states along the Atlantic seaboard, of prohibitory legislation similar to the Maryland statutes, would result in the complete destruction of commerce in menhaden products among the states, and would disrupt the various important industries which depend upon menhaden products. See *Minnesota v. Barber*, 136 U. S. 313. Such retaliatory legislation is not only possible but imminent, and the disastrous effects which would result therefrom are of far greater importance in the national interest than the inconsequential effect which would occur to a small and special class of Maryland citizens if the enforcement of the prohibitory regulations here in question were prevented.

3. It is beyond all reasonable doubt that Section 258 of Article 66C of the Annotated Code of Maryland is, as to the individual Appellants, a violation of the Privileges and Immunities Clause of the Constitution of the United States, and, as to the corporate Appellants, a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. *Toomer v. Witsell*, 334 U. S. 385. In that case the court held that the discrimination was so great as to be virtually exclusionary. In the instant case, the discriminatory prohibition is actually and openly exclusionary.

Conclusion

For the reasons above set forth, it is respectfully submitted that this Honorable Court has jurisdiction on appeal to review the judgment of the specially constituted three-judge district court entered in this cause.

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

C. BOYD CORSA, FISH PRODUCTS COMPANY OF NEW JERSEY, A NEW JERSEY CORPORATION, ATLANTIC NAVIGATION COMPANY, A NEW JERSEY CORPORATION, SEACOAST PRODUCTS, INC., A DELAWARE CORPORATION, AND FISH PRODUCTS COMPANY, A DELAWARE CORP., ET AL.,

Plaintiffs,

VERSUS

JOHN P. TAWES, FRED P. GLOSE AND JOHN R. JEWELL, CONSTITUTING THE COMMISSION OF TIDEWATER FISHERIES OF MARYLAND, AND DANIEL T. PRETTYMAN, STATE'S ATTORNEY FOR WORCESTER COUNTY, MARYLAND,

Defendants.

Before Sobeloff, Circuit Judge, and Chesnut and Thomsen, District Judges.

SOBELOFF, Circuit Judge:

By this suit an individual Delaware plaintiff and corporate plaintiffs of New Jersey and Delaware challenge the constitutionality of certain provisions of Maryland's fishing laws. Two sections of the law are under attack: one, Section 259 of Article 66C of the Annotated Code of Maryland (1951), prohibits the use of purse nets in any of the tidal waters of the State; the other, Section 258, excludes non-residents from fishing privileges in Maryland's tidal waters. Pursuant to Title 28 U. S. C. A., Sections 2281, 2284, this three-judge Court was convened.

The plaintiffs are engaged in various aspects of the menhaden fishing industry — some are menhaden fishing boat owners, others are lessees of such boats and operate processing plants out of the State, The individual plaintiff,

Corsa, is a menhaden boat captain. The Menhaden is a migratory fin fish which travels in large schools and is found during the summer months off the coast of Maryland, and neighboring states, both within and beyond the three-mile belt, and to some extent in the Chesapeake Bay. They are commercially valuable as a source of fish oil and meal and other useful by-products, and plaintiffs' plants, after processing the fish, ship substantial quantities of these products in interstate commerce.

The established practice of the industry is to catch the fish by means of a purse net, for they cannot be caught economically in commercial quantities in any other way. When a school is sighted, the mother boat sends out two smaller seine boats with the purse net. This device, which is often a quarter of a mile in length and eighty feet deep, is designed to capture entire schools of menhaden in one quick operation. Rings on the lower edge of the net rest upon the ocean floor, and the net reaches to within one or two feet above sea bottom. When the school is encircled, the seine boats draw the ends of the net together, closing the purse and entrapping the fish within. Plaintiffs' operations, so far as Maryland territorial waters are concerned, are limited to the ocean strip; they do not fish in the Maryland portion of the Chesapeake Bay or its tributaries.

On June 26, 1956 Corsa's vessel, by use of a purse net, caught a load of menhaden in the Atlantic Ocean within three miles of the Maryland coast. He was thereupon served with a summons by an agent of the defendant Commission of Tidewater Fisheries of Maryland, charging him with violating Article 66C, Section 259, Annotated Code of Maryland (1951), the pertinent provisions of which are not limited to menhaden but prohibit the catching of any fin fish in Maryland tidal waters by use of a purse net. Criminal proceedings thereafter were instituted against Corsa in the Circuit Court for Worcester County.

This suit was brought by the plaintiffs to enjoin the enforcement of Section 259 on the grounds that it violates the due process clause of the 14th Amendment and unduly bur-

dens interstate commerce in contravention of Article I, Section 8 of the United States Constitution. Others similarly engaged in the menhaden industry and faced with prosecution under Section 259 have joined as intervening plaintiffs. The criminal prosecution against Corsa has been continued by the Circuit Court of Worcester County awaiting the outcome of this case. Pending the proceeding in this Court further enforcement of the statute against the plaintiffs has, with the consent of the State, been temporarily restrained by us.

Since the decision in *Manchester v. Massachusetts*, 139 U. S. 240, (1890) it has been beyond dispute that in the absence of conflicting Congressional legislation under the commerce clause, regulation of the coastal fisheries is within the police power of the individual states under the doctrine of *Cooley v. Board of Port Wardens*, 53 U. S. 299. *Manchester v. Massachusetts*, supra, p. 266; *Skiriotes v. Florida*, 313 U. S. 69, 75; *Toomer v. Witsell*, 334 U. S. 385, 393. Congress has not sought to impose uniformity, but has been content to leave the matter to local authority and has recently made this intention explicit in the Submerged Lands Act of 1953, U. S. C. A. Title 43, Sections 1301(e) and 1311(a).

While in the exercise of this power the State is not immune from recognized constitutional limitations, it is to be remembered that in the field of conservation, as in others, courts will not strike down legislative enactments as violative of due process unless the means chosen bear no reasonable relation to the objective sought to be accomplished. *Lacoste v. Department of Conservation*, 263 U. S. 545, 552; *Bayside Fish Flour Co. v. Gentry*, 297 U. S. 422, 427-28. Upon such concepts, prohibitions against the use and possession of purse nets and other particular kinds of fishing devices have been upheld. See *Miller v. McLaughlin*, 281 U. S. 261.

The objection to purse nets is said to be their excessive efficiency. In seeking to prove that the legislation in question bears no reasonable relation to conservation, it has been argued before us that restrictions upon the catching of some

species of fish, including menhaden, have no effect upon conserving the supply. It is said that natural factors, beyond the control of man, such as weather, currents, and salinity, predominantly determine the abundance of fish, and it is the plaintiffs' insistence that the amount of menhaden withdrawn by fishing, regardless of the means employed, is infinitesimal in relation to the present menhaden population. Though there doubtless are differences of opinion among experts as to this and as to the need for and effectiveness of specific conservation measures, we cannot close our eyes to the manifold illustrations of experience, where man's over-exploitation has sharply diminished or even extinguished the supply of natural resources, wild game, and fish. As was said by the Supreme Court in *Bayside Fish Co. v. Gentry*, supra, p. 428, regarding such legislative enactments, ". . . we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose." Moreover, plaintiffs' witnesses who expressed the opinion that such conservation measures in the case of menhaden are unavailing to achieve protection of the supply, admitted that man's activities are the only factor which may be controlled. While insisting that depletion of the supply of menhaden was a possibility too remote to merit serious consideration, they conceded that no resource is inexhaustible and that a point may be reached, due to man's fishing pressure or to natural causes, where further exploitation could bring serious results.

We think, however, that the protective hand of the State may be extended before the danger is unmistakably imminent. Conditions may go unnoticed so long that when the threat is demonstrated it is too late to avert the harm. One witness for the plaintiffs testified that no matter how much a supply may be reduced by over-fishing, provided that the stock is not completely annihilated, it may in time replenish itself. We need not quarrel with this statement of scientific opinion, but in the practical management of its resources, the State may conclude that the time for action is long before the destruction has gone that far. The State is inter-

'ested not merely in the preservation of specimens for museums but in conserving and perpetuating a constant supply.

That a natural resource is subject to injury by causes beyond man's control is not a sufficient reason for us to require the State to refrain from such measures as may reasonably be taken to prevent unnecessary depredations by man. A similar aspect of human experience is in the field of medicine. While it is realized that human health and the life span are largely governed by factors beyond man's control, this realization is not deemed sufficient reason for excluding such efforts as the medical profession can make to protect man against disease and death.

If there is any fact so firmly fixed in the public consciousness as to justify judicial notice of it by judges residing in Maryland it is that the formulation and reformulation of policy, and the administration and enforcement of the State's fishing laws have been matters of perennial and spirited discussion and not infrequent legislation in the General Assembly.[1] Again and again elaborate studies have been made by public officers and commissions. Their recommendations have been debated by the commercial interests concerned, by sports fishermen, in the press and in the legislative chambers. The need for and the effectiveness of various measures regulating the practices, places, and instrumentalities of fishing, have been argued at length at almost every legislative session.

Opinion as to many of these matters is sharply divided, both as to whether particular regulatory provisions have

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[1] The regulation of purse netting has had a long history in Maryland. Some of the enactments to be found are: Ch. 740, Acts of 1908 which contained a preamble reciting that purse nets tended to decrease the stock of food fish, and added Sections 2A and 2B to Article 39, 1904 Code; Ch. 828, Acts of 1914, amending Section 2B; Ch. 14, 1917 (Extraordinary Session) codified as Article 39, Section 4, 1914 Code; Ch. 471, Acts of 1929, Sections 26, 27, 28; Ch. 175, Acts of 1931, codified as Article 39, Section 30, 1939 Code; Ch. 709, Acts of 1941, repealing Section 30 of Article 39, 1939 Code, and revising Section 28; Section 28 of Article 39, 1939 Code, substantially the same as the present Section 259, except for minor revisions made by Ch. 191, Acts of 1943, and Ch. 867, Acts of 1947.

the desired result upon fish population, and also as to the social policy that the State should follow in the management of its resources. It is a difficult problem or complex of problems, and the issues cannot be resolved for all time by any single enactment. Questions as to the adequacy of existing laws bring serious conflict, and no one is in a position to demonstrate absolutely at what point certain protective measures are no longer required. Wide fluctuation in the abundance of various species is not unknown and is a fact acknowledged by the plaintiffs' witnesses. Men disagree as to what is a reasonable and benign utilization of natural resources, and what is destructive exploitation.

Where should these conflicts be resolved? Certainly the courts are not the appropriate forum. These matters are peculiarly legislative in character, and not within the judicial sphere.

It was suggested that menhaden are not fit for human consumption and are not a chief source of food for edible species. Upon this foundation it is argued that menhaden are not a fit subject for conservation, and that to avoid violation of due process, we should carve out of the statutory prohibition against purse netting an exception for this particular fish. In addition to what we have already said there are further considerations which require us to deny this contention.

Considering that fishing has been a principal occupation of man for countless centuries it is astonishing how little precise information we have as to the habits, migrations, propagation, and proper methods of conserving the supply of fish generally. In this nebulous field the menhaden is no exception; indeed it may take rank among those about which least is known. In recent years, marine biologists have been conducting experiments to enlarge the sphere of knowledge. Some of these experiments were testified to by plaintiffs' witnesses, particularly with regard to the extent to which menhaden constitute a food supply for other fish. While these studies indicate that menhaden are not the principal food supply for food fish in Maryland waters, they are a source of some consequence.

A witness for plaintiffs supported his testimony by reliance upon an examination of the contents of the stomachs of 750 blue fish caught in Maryland waters. Menhaden were found in 11 per cent of them, and many of the other 89 per cent contained no food. Reasoning from this slender basis he inferred that menhaden constitute but 11 per cent of the food supply of blue fish. Eleven per cent strikes us as not inconsiderable, but the inference itself seems dubious. It is about as logical to draw from this meager data the broad conclusion that 11 per cent is the limit of the menhaden role in the blue fish diet, as it would be to interpret the experiment as establishing that considerable numbers of blue fish live without food.

Moreover, were the supply of menhaden diminished it might mean that the fish which feed in part upon menhaden would look to other sources, perhaps other food fish, as the witness Hollis supposed. Nor has it been ruled out that other non-edible fish which live in whole or in part on menhaden are themselves eaten by food fish. These assuredly are factors that may be considered. Neither the duration nor the scope of the scientific studies to which we have been directed is such that this court could find in them demonstration beyond further debate that, as applied to menhaden, the regulation here challenged has no reasonable relation to the ends sought to be achieved. The matter was at the time of its enactment and still is one fairly within the province of legislative judgment. We cannot say that the observation made in *Manchester v. Massachusetts*, supra, p. 265, that menhaden are food for other fish has been clearly proved to be erroneous. If there is new light that is claimed to cast doubt on the legislative assumptions, it should be called to the attention of the legislature. If the legislature deems it appropriate to carve out exceptions it may do so.[2] It is not a judicial function to write amendments into the law to accord with the court's ideas of wisdom and appropriateness.

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[2] Indeed a bill is now pending in the legislature which would create an exception for menhaden. Senate Bill 528, 1957 Session.

The difficulty of enforcement is also a salient feature entitled to weight. It was given point by the plaintiff Corsa while on the stand. Testifying that he was aware of the Maryland prohibition against purse nets within the three-mile belt, he stated with astonishing candor that he habitually fished for menhaden within this area whenever he thought he would not be apprehended. The difficulty of enforcement would be compounded if purse netting for menhaden were permitted within the three-mile coastal area. It is obvious that it would be more burdensome to police against purse netting for food fish if purse netters were permitted to enter the area in pursuit of menhaden; an enforcement official so testified.

Decision as to whether the State's interest requires a prohibition of all purse netting in this area in order to protect sports fishing, which itself supports a considerable industry in this State, is also a legislative prerogative. It is a legitimate objective for the State to sponsor sports fishing and the economic interests dependent upon it. Ocean City, the principal seacoast vacation resort of Maryland, is along this coast and numerous sport fishing boats sail from it. While there was testimony of isolated instances where menhaden fishermen operated side by side with game fishermen, the testimony also showed, and it is a matter of common knowledge, that sports fishermen seriously object to purse netting as interfering with their pursuits. The Chairman of the defendant Tidewater Fisheries Commission, Mr. John P. Tawes, testified that his office receives many such complaints from sports fishermen.

Other witnesses testified that New York and New Jersey regulate purse netting within particular areas for the protection of the sports fishery. New York, they said, restricts purse netting in the vicinity of Coney Island, and New Jersey does not allow the practice within two miles of shore in certain areas. If Maryland deems it necessary or desirable to apply the restriction for the entire three-mile width of its short coastal jurisdiction, it may do so.

For these reasons we do not think that the Maryland statute, Section 259, as applied to fishing for menhaden, de-

prives the plaintiffs of their liberty or property without due process of law.

We now turn to the second objection raised by the plaintiffs, namely, that the purse-netting prohibition effects an undue burden upon interstate commerce. This, likewise, we find without merit.

We now turn to the second objection raised by the plaintiffs, namely, that the purse-netting prohibition effects an undue burden upon interstate commerce. This, likewise, we find without merit.

Doubtless catching menhaden and processing them into useful products is a legitimate occupation and is commerce the interstate aspects of which cannot be interfered with arbitrarily. But the same Constitution which puts interstate commerce under the protection of Congress, recognizes the sovereignty of the states in local regulation for the protection of their natural resources. If the adverse effect on interstate commerce is only incidental and indirect and is outweighed by the local benefits which the statute is designed to achieve, the commerce clause will not render the enactment invalid. *S. Pacific Co. v. Arizona*, 325 U. S. 761, 770-1. The local benefits to which we have previously referred clearly indicate a rational basis for the legislation here questioned, and that the interference with interstate commerce is merely incidental. There is nothing to prevent menhaden fishermen from seeking their catch beyond the three-mile belt, for the evidence shows that during the menhaden season the fish are present in plentiful numbers as far as seventy-five miles off coast, and it is the practice to fish up to at least eight miles out.

The plaintiff Corsa testified on direct examination that excluding him from the Maryland three-mile coastal belt would affect his catch 20 per cent. On cross examination, however, he clarified his statement, saying that he merely meant that he caught 20 per cent of his catch opposite the Maryland shore both within and beyond the three-mile belt. Regardless of the actual per cent of loss caused, we may, in any event, assume that it would be more convenient, and

financially advantageous for him and others engaged in the same business to fish close to shore. But we cannot say that the commerce clause requires the State to yield to mere convenience and advantage to particular industries, when it may reasonably consider conservation of paramount importance. Such questions are primarily of a local nature. In *Toomer v. Witsell*, supra, p. 394-5, which dealt with a poundage tax upon fish levied by South Carolina, the Court held that the tax was not a burden on interstate commerce because the taking of the fish occurred before interstate commerce began.

The legislative policy of Congress manifested in the Black Bass Act[3] recently expanded to include other fish[4] is pertinent to the inquiry here, if not controlling. That statute makes it unlawful for anyone to transport fish out of a state where such transportation is prohibited by state law or where the taking of fish is, in the first instance, prohibited by state law. It can be inferred that this statute broadly recognizes the right of the states to burden interstate commerce in fish by forbidding their transportation or by interposing restrictions earlier in the chain of events by prohibiting fishing altogether. It may at least be said that whatever burden Section 259 imposes upon interstate com-

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[3] c. 346, 44 Stat. 576; c. 801, 46 Stat. 845; 16 U. S. C. A. Section 852.

[4] c. 348, 61 Stat. 517; amended c. 911, 66 Stat. 736; 16 U. S. C. A. Section 852. *"Transportation forbidden where law has been violated.* It shall be unlawful for any person to deliver or knowingly receive for transportation, or knowingly to transport, by any means whatsoever, from any State, Territory, or the District of Columbia, to or through any other State, Territory, or the District of Columbia, or to or through any foreign country, any black bass or other fish, if (1) such transportation is contrary to the law of the State, Territory, or the District of Columbia from which such black bass or other fish is or is to be transported, or is contrary to other applicable law, or (2) such black bass or other fish has been either caught, killed, taken, sold, purchased, possessed, or transported, at any time contrary to the law of the State, Territory, or the District of Columbia in which it was caught, killed, taken, sold, purchased, or possessed, or from which it was transported or contrary to other applicable law; . . ."

merce by prohibiting purse netting has been condoned by the Congress.

We conclude, therefore, that Section 259 is not repugnant either to the due process clause of the 14th Amendment or to the commerce clause of the Constitution. The relief prayed, must therefore be denied.

The plaintiffs' challenge is aimed also at Section 258 of Article 66C, on the ground that it discriminates against non-residents in violation of the privileges and immunities clause of the 14th Amendment or, perhaps more accurately, Article IV, Section 2 of the Constitution of the United States. Inasmuch as the State has not attempted to enforce Section 258 against the plaintiffs and has indicated its intention not to do so, and the plaintiffs did not further press for an adjudication of their rights under Section 258, we do not decide the constitutional question raised as to this section in the Bill of Complaint. Even though serious constitutional doubts may be raised (See *Toomer v. Witsell*, supra), a court will not adjudicate constitutional issues unless necessary to dispose of the instant case.

Accordingly, the Bill of Complaint will be dismissed with costs.

SIMON E. SOBELOFF,
U. S. Circuit Judge.

I concur.

W. CALVIN CHESNUT,
U. S. District Judge.

I concur.

ROSZEL C. THOMSEN,
U. S. District Judge.

APPENDIX B

Annotated Code of Maryland (1951), Article 66C, Vol. 2, page 3262.

Tidal Waters

258. (Who may Fish.) It shall be unlawful for any person who is not a bona fide citizen or land owner of Maryland to fish in the tidal waters of this State with nets of any description. Nothing in the above shall be construed to permit such citizen to fish in any tributary waters beyond the jurisdictional limits of the county whereof he is a resident or land owner, except that residents or land owners of the counties bordering on a dividing river may fish such river in common, but not in any creek, cove, river, inlet or sound emptying into the said dividing river and lying wholly within a county other than the one of which he is a resident or land owner, except as provided for in Section 249, sub-title "Riparian Rights," except that a non-resident of one county may fish in the waters within the jurisdictional limits of another county after having first obtained the written permission of the abutting land-owner and providing further that the provisions of this section shall not apply to the catching of eels.

259. (Method of Fishing.) (a) It shall be unlawful to take or catch fin fish for any purpose in the tidal waters of this State by the use of a gig or gig iron, or by the use of any purse net, buck net, beam trawl, otter trawl, trammel net, troll net or drag net. Any person found guilty of fishing or taking fish with any of the equipment or divices listed herein, with the exception of a gig or gig iron, shall be guilty of a misdemeanor and upon conviction thereof shall be fined the sum of not less than $100.00 nor more than $1,000.00, and shall stand committed to the Baltimore City jail or to the county jail until such fines and costs are paid. Any person found guilty of the illegal use of a gig or gig iron shall be subject to the penalties provided in Section 300 of this sub-title.

OCT 15 1957

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 416

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Plaintiffs-Appellants,

VS.

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Defendants-Appellees,

EDWIN ALLISON, ET AL.,
Intervening Plaintiffs-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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Table of Contents

	PAGE
Introduction	1
Argument	2
I. Section 259(a) Violates The Due Process Clause And Unduly Burdens Commerce	4
(a) The protection of commercial sport fishing is no justification for the Maryland statutes	5
(b) The difficulty of enforcing the law is no justification for the Maryland statutes	6
(c) The use of menhaden as food for other fish does not justify the complete prohibition of the taking of menhaden in Maryland waters	7
(c) There is no evidence that the Maryland statutes were designed to prevent the exhaustion of the supply of menhaden, or that their result will be to prevent such exhaustion	8
II. The Constitutionality Of Section 258 Must Be Determined In This Case	8
Conclusion	9

Table of Authorities

Geer v. Connecticut, 161 U. S. 519	3, 5
H. P. Hood and Sons v. DuMond, 336 U. S. 525	6
Lacoste v. Department of Conservation, 263 U. S. 545	5

	PAGE
Lawton v. Steele, 152 U. S. 133	5
Liggett v. Baldridge, 278 U. S. 105	6
Manchester v. Massachusetts, 139 U. S. 240	4
South Carolina State Highway Department v. Barnwell Bros., 303 U. S. 177	5
Toomer v. Witsell, 334 U. S. 385	3, 4, 6

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INTRODUCTION

The Plaintiffs-Appellants and Intervening Plaintiffs-Appellants, herein referred to collectively as Appellants, have set forth in their Jurisdictional Statement the basis of this Court's jurisdiction, the questions presented by this appeal, the statement of the facts and history of this case, and references to the opinion of the District Court and to the statutes, the constitutionality of which is here brought in question, as well as the text of that opinion and of those statutes.

The Defendants-Appellees, herein referred to as Appellees, have filed a motion to affirm the judgment of the District Court. Appellants contend that such motion should not be granted because the questions raised in this appeal are of such a substantial nature and involve matters of such general public importance that their decision requires the consideration of this Court. Appellants further contend that the decision of the District Court should be reversed.

ARGUMENT

The questions presented in this appeal are of manifest importance not only to the large and indispensable industry represented by the Appellants, and to the State agencies represented by the Appellees, but also to the consuming public and to the manufacturers and distributors of the many and varied products which are derived solely from the menhaden industry.

It is true, as stated by the Appellees, that the Appellants' fishing operations are carried on along the Atlantic Coast from Montauk Point, Long Island, to Cape Charles, Virginia. However, in considering the extent of the fishing area, it must be borne in mind that menhaden, being migratory fish, are present in any one segment of this area only during certain stages of their annual migrations. Consequently, during a certain portion of the fishing season menhaden are found in abundance only in the ocean waters off the coast of Maryland and the adjacent states. Furthermore, the uncontradicted testimony produced before the District Court is that schools of menhaden must be caught when and where they are sighted. If not so caught, they will likely be lost to commerce.

It is also true that although menhaden are sometimes caught beyond the three-mile limit, as stated by Appellees,

it is impractical to fish for them in waters too distant from the shore because of certain technical aspects of the process of purse netting. Moreover, the testimony before the District Court shows that menhaden are found in greatest abundance within the three-mile maritime belt, or so close thereto that it is impossible, as a practical matter, to determine whether they are within or outside that limit.

It is clear, therefore, that the enforcement of the Maryland statutes would disrupt and possibly destroy Appellants' businesses, which, to exist, must have a daily supply of menhaden. The only reason that such disruption has not already taken place is that the State of Maryland has not, in the past, made any substantial effort to enforce the statutes here in question, insofar as the waters of the ocean are concerned.

The decision of the District Court is palpably incorrect. It has extended the admitted power of the State to enact conservation measures far beyond the recognized constitutional limitations which restrict that power. The power of a state to enact conservation measures flows from and is supported by the state's right to preserve its resources for consumption by its own citizens. See *Geer v. Connecticut*, 161 U.S. 519. When, as in the instant case, it is admitted by the state that neither menhaden nor any fish which feed on menhaden are entirely retained within the state for consumption by its citizens, no justification exists for the complete prohibition by the state of the taking of menhaden. Furthermore, even if Maryland has the power to enact such prohibitions in regard to other resources in order to preserve them for consumption by its citizens, the Court has raised grave doubts as to the applicability of that power to free-swimming fish in ocean waters within the three-mile belt. *Toomer v. Witsell*, 334 U.S. 385, 404. Although it was

not necessary in that case for the Court to resolve those doubts, it may well be necessary for the Court to do so in the present case.

Most important, however, Appellants contend that the reasons given by the District Court in support of the Maryland statutes are not sufficient to justify the deprivation of liberty and property, and the burden upon commerce among the states which are imposed by those statutes.

I.

Section 259(a) Violates the Due Process Clause and Unduly Burdens Interstate Commerce.

The case of *Manchester v. Massachusetts*, 139 U.S. 240, is no obstacle to this Court's reversing the decision of the District Court. In the *Manchester* case the Court gave no consideration to the question of whether or not the statutes there involved violated the due process clause, nor is there any indication that an argument based on violation of that clause was presented to the Court.

Furthermore, the *Manchester* decision has not foreclosed the question of whether or not the statutes involved in this case violate the commerce clause. The *Manchester* decision was based upon the assumption by the Court that, in respect to the regulation of fisheries in Buzzard's Bay, a state statute did not violate the commerce clause unless it conflicted with affirmative legislation enacted by Congress pursuant to the commerce clause. Since then the Court has made it abundantly clear that a state regulation of its fisheries may violate the commerce clause, even where Congress has not acted. In *Toomer v. Witsell*, *supra*, although the Court specifically noted that there were no Federal acts controlling the fisheries involved, it, nevertheless, found that a South Carolina Statute seeking to

regulate those fisheries placed an undue burden upon interstate commerce.

While the Appellants do not dispute the assertion that the preservation of game and fish is generally within the police power of the states, they assert most vigorously that the very decisions cited by the Appellees as affirming this general power make it clear that the exercise of the power is restricted to instances wherein it is reasonable, does not impose arbitrary or unnecessary restrictions upon lawful occupations, and does not unduly impede the flow of commerce. *Geer v. Connecticut*, 161 U.S. 519; *Lawton v. Steele*, 152 U.S. 133, 137; *Lacoste v. Department of Conservation*, 263 U.S. 545, 552. The facts in the present case, disclosed by the record as a whole, show that the attempted exercise by the State of Maryland of its power to enact conservation measures was unreasonable and arbitrary in the present instance, places a completely unnecessary restriction upon the pursuit of a lawful occupation and hampers and threatens to destroy commerce in menhaden products. In *South Carolina State Highway Department v. Barnwell Bros.*, 303 U.S. 177, cited by Appellees in their motion to affirm, this Court has stated at pages 191-2 that in cases involving a question of the constitutionality of a state law, it will review the whole record to determine whether the legislative action of the state has the necessary "rational basis". It is submitted that the grounds cited by the Appellees and by the District Court in support of the Maryland statutes do not disclose such "rational basis".

(a) *The protection of commercial sport fishing is no justification for the Maryland statutes.* By asserting this ground as justification for the statutes in question, the Appellees concede that one of Maryland's purposes in enacting and enforcing those statutes is to give special protection to a

private interest group within the State, rather than being for the benefit of the public at large. For the supposed benefit of the financial interests of this special group, the State has prohibited the pursuit of a lawful occupation within its jurisdiction. Uncontradicted testimony before the District Court has shown that the use of purse nets for catching menhaden in the ocean does not, in any way, impede sport fishing. The only evidence introduced by the Appellees was that sport fishermen object to purse netting, but not that those objections are well-founded. However, even if there were some support for the contention that purse netting interferes with sport fishing, it cannot be said that the protection of the sport fishing interests has such real and substantial relation to the health, safety, morals or general welfare of the people of Maryland that legislation designed to give preferential treatment to sport fishermen is justified. Such relation is a prerequisite to the state's interfering with the right to engage in a lawful occupation. *Liggett v. Baldridge*, 278 U.S. 105; see also *H. P. Hood & Sons v. DuMond*, 336 U.S. 525.

It is no objection, as contended by Appellees, to a reversal of the District Court that the Maryland Legislature attempted to repeal the statutes, insofar as they apply to purse netting in the ocean for menhaden. An unconstitutional statute does not become less unconstitutional merely because the Legislature has indicated that it is aware that the prohibitions in such legislation are unnecessary for the conservation of the state's natural resources; nor should the Appellants be deprived of their judicial remedy merely because, as contended by the Appellees, the Legislature might, at some future date, rectify its mistake.

(b) *The difficulty of enforcing the law is no justification for the Maryland statutes.* In *Toomer v. Witsell*, 334 U.S. 385, 406, it was argued that a South Carolina statute which

required shrimp fishermen to dock and unload at South Carolina ports was justified on the grounds that it was required in order to enforce a tax on shrimp. The Court did not accept this argument and stated:

> "The importance of having commerce between the forty-eight states flow unimpeded by local barriers, persuades us that state restrictions inimical to the commerce clause should not be approved simply because they facilitate in some measure the enforcement of a valid tax."

It cannot be said that the difficulty of enforcing the Maryland statutes, insofar as other types of fish are concerned, justifies making the restriction apply to menhaden when the result is inimical to the Fourteenth Amendment and the commerce clause.

Furthermore, it has not been shown by any testimony produced before the District Court that there has been even one instance in which Maryland enforcement officers have found that purse nets have been used for catching food fish in Maryland waters. See Transcript of Testimony, Vol. 1, page 131, Vol. 2, page 331, and letter of Alexander Harvey, II, Esq., to the District Court Judges dated March 7, 1957, which by stipulation of the parties is part of the record in this appeal.

(c.) *The use of menhaden as food for other fish does not justify the complete prohibition of the taking of menhaden in Maryland waters.* There is no dispute about the fact that menhaden constitute a food supply for some game fish. However, the record indicates that menhaden are not the most important source of such food. Moreover, the testimony of scientific experts produced before the District Court was most definite that the supply of menhaden is almost inexhaustible and that it is inconceivable that the

Appellants' fishing for them could have any effect upon their supply.

(d) *There is no evidence that the Maryland statutes were designed to prevent the exhaustion of the supply of menhaden or that their effect will be to prevent such exhaustion.* As stated by the Appellees, witnesses produced before the District Court having knowledge of marine biology and oceanography, testified that the supply of menhaden is at present almost inexhaustible. Although those witnesses stated that there had been minor fluctuations in this supply during some individual years, the general pattern indicates that this almost inexhaustible supply has been increasing, despite an increased fishing effort. These witnesses indicated that from their calculations, fishing for menhaden has actually tended to stimulate rather than hinder this increase. They further stated, without contradiction, that it is inconceivable that the prohibitions enacted by the State of Maryland could have any connection with the supply of menhaden in the ocean off the coast of Maryland.

II.

The Constitutionality of Section 258 Must Be Determined in This Case.

For the reasons set forth in their jurisdictional statement, the Appellants contend that Section 258 of Article 66(c) of the Maryland Code is unconstitutional. If Section 259(a) is found by this Court to be unconstitutional, it is submitted that the question of the constitutionality of Section 258 must be passed upon to determine the rights of the Appellants (all non-residents of the State of Maryland) to fish with nets in Maryland waters, and to protect the Appellant, Corsa, from criminal prosecution under this

statute. The assurances of the present Maryland officials that they will not enforce Section 258 are not binding upon the successors of those officials and, therefore, such assurances constitute no protection for the Appellants.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the Appellants present a substantial question by this appeal, and that the motion of the Appellees be overruled, and that the decree of the District Court dismissing the Bill of Complaint should be reversed.

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INDEX

Table of Contents

	PAGE
Motion to Affirm	1
Questions Presented	2
Statement of Facts	2
Argument	4
I. Section 259(a) does not Violate the Due Process Clause	5
(a) The Protection of Commercial Sport Fishing in the State	7
(b) The Difficulty of Enforcing the Law	8
(c) The Use of Menhaden as Food for Other Fish	9
(d) Preventing the Exhaustion of the Supply	9
II. Section 259(a) does not Constitute an Unreasonable Burden on Interstate Commerce	9
III. Determination of the Constitutionality of Section 258 is not Necessary to a Decision of this Case	11
Conclusion	13

Table of Citations

Cases

Corsa v. Tawes, 149 F. Supp. 771	4
Foster-Fountain Packing Co. v. Haydel, 278 U. S. 1 (1928)	10
Geer v. Connecticut, 161 U. S. 519 (1896)	5, 6, 10, 11
Lacoste v. Dept. of Conservation, 263 U. S. 545 (1924)	6

	PAGE
Lawton v. Steel, 152 U. S. 133 (1894)	6
Manchester v. Massachusetts, 139 U. S. 240 (1890)	5, 6, 7, 9, 10
Miller v. McLaughlin, 281 U. S. 261 (1930)	6
Silz v. Hesterberg, 211 U. S. 31 (1908)	6
Skiriotes v. Florida, 313 U. S. 69 (1941)	5
South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U. S. 177 (1938)	7
Toomer v. Witsell, 334 U. S. 385 (1948)	5, 10

Statutes

Acts of 1957 (Senate Bill No. 528), pp. 1663-1665	8
Annotated Code of Maryland (1951 Ed.):	
Article 66C—	
Section 258	2, 3, 4, 11, 12
Section 259(a)	2, 3, 4, 5, 8, 9, 11, 12
Section 300	12

Miscellaneous

Constitution of the United States:	
Article I, Section 8	2
Article IV, Section 2	2
Fourteenth Amendment	2, 5
Rules of the Supreme Court (Revised):	
Rule 16	1
43 U. S. C. A., Sections 1301-1343	6, 7

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Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the final judgment and decree of the United States District Court for the District of Maryland be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

1. As applied to fishing for menhaden in the waters of the Atlantic Ocean under Maryland jurisdiction, is the prohibition in Section 259(a) of Article 66C of the Annotated Code of Maryland (1951) against fishing with purse nets an unreasonable and arbitrary exercise of state police power in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

2. Do the provisions of said Section 259(a) constitute an unreasonable or discriminatory burden on interstate commerce in violation of Article I, Section 8, of the United States Constitution?

3. Should this Court undertake to determine whether Section 258 of Article 66C of the Annotated Code of Maryland (1951) violates the equal protection clause of the Fourteenth Amendment or Article IV, Section 2, of the United States Constitution when a determination of such constitutional questions is not necessary to a decision in the case?

STATEMENT OF FACTS

The Atlantic coast line of Maryland extends a mere 28 miles in length between the neighboring States of Delaware on the north and Virginia on the south. The jurisdiction of the State of Maryland over the waters of the Atlantic Ocean extends but 3 miles from the shore line.

The menhaden fishing operations of the Appellants and the Intervening Appellants are carried on from May until October along an extensive portion of the eastern coast of the United States from Montauk Point, Long Island, to Cape Charles, Virginia. Some of the Virginia parties likewise fish in the Chesapeake Bay, but the present suit is con-

cerned only with fishing for menhaden in the waters of the Atlantic Ocean. Schools of menhaden may be found anywhere from the shore line to 40 miles offshore, but fishing generally occurs from one-half mile to 8 miles from the shore. Testimony on behalf of some of the Appellants was to the effect that 20% of their catch was made in waters off the Maryland coast, but the witness could not state what portion of this 20% figure was within the 3 mile limit and thus under Maryland control. Other witnesses testified that no more than 5% of their menhaden catch occurred in waters off Maryland, but again there was no attempt made to specify the percentage caught within Maryland jurisdiction.

The principal piece of equipment used by menhaden fishermen consists of a "purse net", which extends a quarter of a mile in length and is capable of capturing hundreds of thousands of fish. The net is operated by small boats which go out from the mother ship and place the net around a school of menhaden. Such nets may be let down to a depth of 80 feet or all the way to the bottom in shallow water inside the 3 mile limit.

In this suit, Appellants have sought an injunction against law enforcement officers of the State of Maryland to prohibit them from enforcing against the Appellants the provisions of Sections 258 and 259(a) of Article 66C of the Annotated Code of Maryland (1951). Section 259(a) prohibits, *inter alia*, the use of purse nets by any one for catching any type of fish in Maryland waters. Section 258 prohibits the use of nets of any description for the catching of fish in Maryland waters by others than residents of Maryland. However, Appellants have not enforced and do not intend to enforce the provisions of Section 258 against Appellants.

Following a trial of this action before a three-judge United States District Court, an Order dated May 10, 1957 was entered dismissing the Complaint and the Intervening Complaint. In its Opinion, which is reported in 149 F. Supp. 771, the lower court held as follows: (1) that Section 259(a) of Article 66C of the Annotated Code of Maryland (1951), as applied to fishing for menhaden in waters of the Atlantic Ocean under Maryland jurisdiction, did not deprive the Appellants of their liberty or property without due process of law; (2) that said Section 259(a) was not an undue burden on interstate commerce; and (3) that a decision as to whether Section 258 discriminates against non-residents in violation of the privileges and immunities clause or the equal protection clause of the United States Constitution was not necessary to dispose of the case.

From the decree of the lower court, this direct appeal has been taken.

ARGUMENT

The questions presented in this appeal are manifestly so unsubstantial as not to require further argument. In the first place, the effect of the Maryland statute on the large scale fishing operations of Appellants is relatively insignificant. The Maryland statute prohibiting the use of purse nets for fishing in Maryland waters has been in effect in substantially its present form since 1941. Appellants have successfully conducted their fishing operations for a great many years since that date. In view of the extensive range of the menhaden fleet which fishes along hundreds of miles of the Atlantic Coast from the end of Long Island to Cape Charles, Virginia, the elimination of a mere 28 miles of coast line can hardly cause substantial damage to Appellants' business. Furthermore, in the 28-mile area, Maryland can assert jurisdiction only to the 3-mile limit.

Appellants are therefore free to fish with purse nets off the coast of Maryland in the 3 to 40 mile zone where menhaden are found. As disclosed by the testimony, states such as New Jersey and New York have prohibited purse netting in particular areas along their shores. The Maryland law, which has applied the restriction along the whole of its short Atlantic coast, is not one which affects to any measurable degree Appellants' business operations, which have and will continue to be conducted despite local prohibitions against the use of purse nets.

Secondly, the decision of the District Court is plainly correct on each of the three questions raised herein. The law applicable to the constitutionality of state statutes regulating fishing and hunting has been clearly stated by this Court on a number of occasions. *Geer v. Connecticut*, 161 U. S. 519 (1896); *Skiriotes v. Florida*, 313 U. S. 69 (1941); *Toomer v. Witsell*, 334 U. S. 385 (1948). The lower court, after hearing extensive testimony, reached the unanimous conclusion that none of Appellants' grounds for attack could be sustained. The three points decided will be considered hereunder.

I.

Section 259(a) Does Not Violate the Due Process Clause

To sustain Appellants' contention that Section 259(a) of Article 66C of the Annotated Code of Maryland (1951) violates the due process clause of the Fourteenth Amendment, this Court would be required to directly overrule *Manchester v. Massachusetts*, 139 U. S. 240 (1890). The similarity between that case and the present one is remarkable. There, as in the present case, an attack based on constitutional grounds was directed against a state statute prohibiting the use of certain types of nets for taking fish in

state waters. The fish in question were menhaden, and the nets were purse nets. This Court rejected arguments that the statute violated the due process and commerce clauses and affirmed the decision of the lower court holding the statute valid as a reasonable regulation of fishing. This Court said the following at page 265:

> "The preservation of fish, even although they are not used as food for human beings, but as food for other fish which are so used is for the common benefit; and we are of the opinion that the statute is not repugnant to the constitution and the laws of the United States."

In *Manchester v. Massachusetts, supra*, this Court applied to restrictions against fishing for menhaden with purse nets the well recognized principle that the preservation of game and fish is within the proper domain of the police powers of a state. *Lawton v. Steel*, 152 U. S. 133 (1894); *Geer v. Connecticut, supra*. In *Lacoste v. Department of Conservation*, 263 U. S. 545 (1924), this Court stated the rule as follows:

> "Protection of the wild-life of the State is peculiarly within the police power and the State has great latitude in determining what means are appropriate for its protection."

This Court has even gone further and upheld as constitutional state statutes enacted in support of a state conservation policy, such as an act forbidding the mere possession of nets, traps or seines for fishing in the state waters, *Miller v. McLaughlin*, 281 U. S. 261 (1930), and an act making illegal the mere possession of game during a closed season, *Silz v. Hesterberg*, 211 U. S. 31 (1908).

Congress itself has, by virtue of the Submerged Lands Act of 1953, 43 U. S. C. A., §§1301-1343, withdrawn all claim

that the Federal Government might have to fish or marine life within the 3 mile limit and has recognized the property rights of each individual state in and to the same. Section 1311 of that Act provides that it is in the public interest that (1) title to and ownership of the natural resources within the waters within the boundaries of the respective states and (2) the right and power to manage, administer, develop and use said natural resources be vested in and assigned to the respective states. "Natural resources", under Section 1301, are defined as including all fish and other marine, animal and plant life.

Appellants suggest that advances in scientific knowledge since *Manchester v. Massachusetts, supra*, make unreasonable any prohibition against catching menhaden with purse nets. As the lower court pointed out after hearing the evidence in the case, the complex problem of deciding where to draw the line in conservation is not a question which the courts should decide. It is a matter peculiarly legislative in character. When the action of a legislature is within the scope of its powers, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts but for the legislative body on which rest the duties and responsibility of decision. *South Carolina State Highway Department v. Barnwell Brothers, Inc.*, 303 U. S. 177 (1938).

The Opinion of the lower court sets forth four different grounds for sustaining the reasonableness of the statute in question, as follows:

(a) *The Protection of Commercial Sport Fishing in the State.* Appellants concede that ocean sport fishermen in Maryland have consistently taken the position that fishing for menhaden with purse nets within the 3-mile limit

seriously conflicts with their activities, but Appellants contend that such a position is unjustified. Obviously a conflict must result if sport fishing boats and menhaden boats with their tremendous nets operate side-by-side in the same area within the 3-mile zone. The promotion of sport fishing and the economic benefits derived by the State therefrom are a legitimate legislative objective. As the State's witnesses testified, sociologic and economic considerations are here involved as well as those of conservation. The lower court pointed out that the regulation of purse netting has had a long history in Maryland, and that the administration and enforcement of the State's fishing laws have been matters of perennial and spirited debates in the General Assembly and elsewhere. In the 1957 session of the Maryland Legislature, an act was passed permitting the use of purse nets to catch menhaden. However, because of a defective title the act was vetoed by the Governor. Senate Bill 528, Laws of Maryland 1957, pp. 1663-1665. Appellants' recourse is therefore to the Maryland Legislature, where a properly drawn bill may well be enacted in view of the position taken by the 1957 Legislature.

(b) *The Difficulty of Enforcing the Law.* If an exception for menhaden were carved out of the general prohibition against the use of purse nets, it is clear, as testified by the Chairman of the Maryland Tidewater Fisheries Commission, that it would be very much more difficult to enforce the law insofar as other types of fish were concerned. It is admitted that small quantities of edible fish are caught even when purse nets are used to catch menhaden. In considering the propriety of relaxing a prohibition such as that contained in Section 259(a), a Legislature may clearly concern itself with enforcement difficulties resulting from such relaxation.

(c) *The Use of Menhaden as Food for other Fish.* Appellants contend that since menhaden are inedible by human beings, laws designed to prevent exhaustion of the supply are unjustified. But menhaden are an important source of food for blue fish, rock fish (striped bass) and other species which are edible by human beings. To preserve an adequate supply of blue fish and rock fish, Maryland may justifiably act to conserve their food supply. *Manchester v. Massachusetts, supra* at page 265, held that even though menhaden were merely used as food for other fish, it was a legitimate legislative policy to preserve the supply.

(d) *Preventing the Exhaustion of the Supply.* The evidence indicates that menhaden are used in Maryland as bait for crab pots and also by commercial sport fishermen as bait, and for "chumming" purposes. Several of Appellants' witnesses took the position that the supply of menhaden was at present almost inexhaustible. However, it was admitted that in past years the menhaden population had fluctuated greatly and had even disappeared in some waters where the supply had formerly been abundant. It was further admitted that, of all the factors affecting the supply of these fish, the only one which man could control was overfishing. Certainly Maryland does not have to wait for the supply to begin to dwindle or possibly even disappear before it can constitutionally enact a law designed to preserve this resource.

II.

Section 259(a) Does Not Constitute an Unreasonable Burden on Interstate Commerce.

The prohibition in Section 259(a) against the use of purse nets in Maryland waters applies equally to residents of Maryland and to non-residents, to fish shipped in inter-

state commerce and to fish used internally. Being non-discriminatory in nature, if it is to be found in conflict with the commerce clause, the statute must be held an unreasonable burden on interstate commerce.

In any event, the prohibition of the Maryland statute applies before the menhaden enter the flow of interstate commerce. This distinction was clearly recognized in *Toomer v. Witsell, supra.* In that case, a statute of South Carolina taxing the taking of raw shrimp in the 3-mile zone was held, at page 394, not in conflict with the commerce clause since the taxable event, the taking of shrimp, occurred before the product could be said to have entered the flow of interstate commerce. However, this Court in the same case, at page 406, declared invalid another South Carolina statute, which required the owners of shrimp boats fishing in state waters to dock and unload at a South Carolina port and pay a tax on the catch. In the latter instance, the shrimp had clearly entered the flow of interstate commerce at the time of the state regulation.

In *Geer v. Connecticut, supra,* a Connecticut statute making it unlawful to kill or possess game birds for transportation beyond the limits of the state was attacked on the ground that it violated the commerce clause. This Court sustained the validity of the statute on the grounds that a state had the authority to affix conditions to the killing and sale of wild game within its borders without violating the commerce clause. See also *Manchester v. Massachusetts, supra.*

There is nothing to the contrary in *Foster-Fountain Packing Co. v. Haydel,* 278 U. S. 1 (1928). The Louisiana statute in that case prohibited the shipping of raw and unshelled shrimp out of the state, but permitted the shipment of the product when it had been produced and prepared

within the state. The Supreme Court, in holding that the statute was in contravention of the interstate commerce clause, noted that the protection of the commerce clause attached at the time of the taking of the shrimp. The Court said that the state, as representative of its people, "might have retained the shrimp for consumption and use therein", but that, in direct opposition to conservation for intrastate use, the enactment permitted all parts of the shrimp to be shipped and sold outside the state. Continuing, the Court stated as follows:

> "* * * but, by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and as to the shrimp so taken definitely terminates its control."

The Maryland statute in prohibiting what the Legislature has deemed an excessively efficient manner of taking fish has applied the prohibition before the state has terminated its control over the product. The right to preserve game flows from the undoubted existence of a state's police power, which may be called into play even if interstate commerce is remotely and indirectly affected. *Geer v. Connecticut, supra*, at page 534. If Appellants' contentions are correct, no state could enact conservation measures to preserve the supply of any species of fish or game which might be shipped in interstate commerce.

III.

Determination of the Constitutionality of Section 258 is Not Necessary to a Decision of This Case.

In their Complaint, Appellants sought to enjoin the enforcement of Section 258 of Article 66C of the Annotated Code of Maryland (1951) as well as of Section 259(a).

Section 258 makes it unlawful for non-residents to fish with nets of any description in the waters of the state. The lower court declined to rule on Appellants' contentions that this Section violates the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment on the grounds that a determination of these constitutional issues was not necessary to a decision of the case.

Appellees concede that if Section 259(a) is in conflict with the due process clause or the commerce clause, as applied to fishing for menhaden with purse nets in the Atlantic Ocean, Section 258 is invalid for identical reasons. If, however, Section 259 is valid, Appellants will not be affected in any way by Section 258. The evidence clearly establishes that Maryland officials will not enforce Section 258 against Appellants since the penalties under Section 259(a) are very much greater. The penalties specifically provided by Section 259(a) are a fine of not less than $100 00 nor more than $1,000.00 and commitment to jail until the fine is paid. Section 258, on the other hand, does not itself contain a penalty clause. The penalty for violating the latter section is, therefore, to be found under the general penalty provisions of Section 300, which provides for the lesser fine of from $25.00 to $100.00.

Appellant Corsa, himself, has been charged with violating solely Section 259(a), and such criminal prosecution is currently pending before the Circuit Court for Worcester County, Maryland. Since the Appellants cannot suffer harm or injury from a statute which would not be enforced against them, it is not necessary to a determination of this case that their constitutional attack on Section 258 be heard by this Court.

CONCLUSION

For the reasons above stated, it is respectfully submitted that by this appeal the Appellants present no substantial question for the decision of this Court and that the decree of the District Court dismissing the Bill of Complaint should be affirmed.

Respectfully submitted.

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